No. 1490

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK WATERHOUSE & CO., INC. *Appellant* vs. GRENVILLE M. DODGE, *Appellee* FRANK WATERHOUSE, *Defendant*	*No. 1490*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

(NOTE—In the record the evidence is not printed in the order in which it was given. A clearer understanding of the case will be had by reading the testimony in the following order:

Deposition of G. M. Dodge, Record, pp. 462-478.

Deposition of Frank S. Pusey, Record, pp. 479-529.

Testimony on behalf of Complainant, Record, pp. 68-204.

Testimony on behalf of Respondent, Record, pp. 204-311.

Testimony of Complainant in rebuttal, Record, p. 312.

Interrogatories to Frank S. Pusey, in rebuttal, and answers thereto, Record, pp. 42-54.)

STATEMENT.

In February, 1904, the appellant, Frank Waterhouse & Co., Inc., being then the owner of the steamship "Garonne" contracted to sell her to the North Alaska Steamship Co., a New York corporation, for $85,000.00, payments to be made in installments covering a number of months (Defendant's Exhibit A, Record, p. 361).

On February 15th an installment of $14,000 on the purchase price of the steamship Garonne became due, and to pay the same the North Alaska S. S. Co. borrowed from appellee $12,000 and applied the same on account of the purchase price of the Garonne. In March an additional $1500 was borrowed from appellee by the North Alaska S. S. Co. and used in making another part payment of the purchase price (deposition of G. M. Dodge, Record, pp. 467, 470, and deposition of Pusey, Record, p. 480, et seq., testimony of W. H. Rowe, Record, pp. 104-110). In May, 1904, the North Alaska S. S. Co. entered into an agreement with the appellee, setting forth its indebtedness to appellee and agreeing to secure such indebtedness by a mortgage on the steamship Garonne. (See complainant's exhibit 1, Record, p. 531).

The mortgage mentioned in Complainant's Exhibit 1

not being executed, and the indebtedness to appellee not being paid, the "Garonne" being in Seattle about to sail to Nome, appellee sent his agent, Frank S. Pusey, on May 31, 1904, to Seattle, for the purpose of securing payment of the amount due. *This Pusey was prepared to do by attachment or other appropriate proceedings, if necessary.* But before taking any legal proceedings, Pusey conferred with Frank Waterhouse & Co. and Frank Waterhouse, in regard to the situation, and upon the arrival in Seattle of Charles B. Smith, the president of the North Alaska Steamship Company, conferences were had between the three. (See deposition of Pusey, Record, p. 479, et seq.)

After Pusey's arrival in Seattle, he was advised from New York that a payment of $5000 had been made on the indebtedness due to appellee, leaving a balance then due from the North Alaska Steamship Co. to the appellee of $10,000, of which $1500 represented interest due on the amounts advanced by the appellee and expenses in connection with the loans and in the securing of the same and obtaining payment, including legal expenses relating thereto and the amount so agreed upon in this regard was afterwards ratified by the North Alaska S. S. Co. (Pusey's deposition, Record, p. 479, et seq.)

The North Alaska S. S. Co. paid to appellee, from time to time, various sums on account of the purchase price of the ship and for permanent betterments to and

supplies furnished her, so that on May 31, 1904, the ship being then about to sail for Alaska, the situation was as follows (see Complainant's Exhibit 19, Record, p. 326). There had been paid to Waterhouse & Co., on account of the purchase price of $85,000, the sum of $47,328.54, leaving still due on this account ----------$37,671.46

There was due Gen. Dodge ----------$10,000.00

In order to arrange for the payment of this indebtedness, and the security of the parties interested, and that the ship might be allowed to sail, Pusey, Smith and Waterhouse then had an interview when it was decided that the amount due appellee, viz.: $10,000, and the amount claimed by the appellant as unpaid upon the purchase price of the steamship "Garonne," viz.: $37,671.46, should be secured by a mortgage aggregating $47,671.46 upon the steamship "Garonne" made in the name of Frank Waterhouse & Co., as trustee, and in fact the mortgage was drawn at that time by the trustee in accordance with this agreement and signed by Smith, as president of the North Alaska S. S. Co. In this mortgage it was expressly provided that the $37,671.46 due Waterhouse & Co. should be a prior lien over the $10,000 due Dodge. Smith also executed a note for $10,000 to Waterhouse & Co. as trustee for Dodge, dated June 2, 1904, and due two months after date. Smith also gave to Waterhouse & Co., as trustee, for Dodge, an assignment of freight moneys to

be earned by the steamer on her contemplated trip North (Pusey's deposition, Record, p. 491), but it does not appear that any money was ever received on this assignment. (See Comp. Exhibits 2 and 4, Rec. pp. 536, 546).

Waterhouse & Co., and Pusey, representing Gen. Dodge, then executed at the request of Waterhouse, the trust agreement set out in Complainant's Exhibit 3 (Record, p. 537).

These several documents, to-wit.: Comp. Exhibits 2, 3 and 4, were given, as appellant well knew, for the purpose of securing the amount due appellee, and accepted by Pusey as such; and in consideration thereof Pusey withdrew his threat of legal proceedings, and permitted the ship to sail. Believing he had protected the rights of Gen. Dodge as far as was possible, and that he was dealing with men of principle, and relying on these several agreements, and that Waterhouse & Co. would faithfully carry out the trust as it agreed to do, Pusey then left Seattle.

The mortgage and a bill of sale from Waterhouse & Co. to North Alaska S. S. Co. of the ship were then forwarded by Waterhouse to the Chase National Bank of New York, with instructions to turn the bill of sale over to the North Alaska S. S. Co. upon its execution of the mortgage. This mortgage was never executed, save by Smith as president of the North Alaska S. S. Co., and the

bill of sale never delivered.

W. F. King seems to have prevented the execution of the mortgage, as part of the plan hereinafter shown.

From the time of the purchase by the North Alaska S. S. Co. until she returned from Alaska, and was surrendered to Waterhouse & Co., the "Garonne" was in the possession of the North Alaska S. S. Co., and made the voyage to Alaska, leaving Seattle June 2, 1904, in its possession, and during said time Frank Waterhouse & Co. acted as agents for the ship, receiving a commission on both receipts and disbursements. (Testimony of King, p. 193, Comp. Exhibit 10, p. 320; testimony of Waterhouse, pp. 155, 173, 174 and 238; Comp. Exhibits 9, p. 316; 11, p. 321; and 19, p. 326).

Neither Dodge nor Pusey heard from Waterhouse & Co. after Pusey left Seattle, until about August 25, 1904 (Pusey's deposition, Record, p. 498), when Pusey received a letter from Waterhouse & Co. dated Aug. 2, 1904, but which, by reason of being misdirected, was returned to Seattle and remailed Aug. 19, 1904. (See Defendant's Exhibit No. 3, Record p. 437, and Complainant's Exhibit 24, Record p. 350). This letter was in reply to letters and telegrams from Pusey asking for information, and *incorrectly* stated, that Waterhouse & Co. had had to assume an indebtedness of $35,000 against the ship, and had subsequently sold her to another party. No amount or name was mentioned.

In the latter part of June, 1904, one William F. King of New York began investigating the situation of affairs of the North Alaska S. S. Co., and sent one Meade to Seattle, with the result that he (Meade), Frank Waterhouse and his attorney, Mr. Bogle, came to New York.

On his arrival at New York Waterhouse demanded that the North Alaska S. S. Co. complete the purchase of the steamer, and pay some $30,000 of indebtedness which Waterhouse claimed was against her. The total of Waterhouse's demand amounted to some $67,000.00, but in it was *not* included Gen. Dodge's claim, nor does it appear that Waterhouse ever alluded to it, or took any means to secure its payment. The North Alaska Company could not meet these demands. Waterhouse (representing the appellant) then turned to W. F. King, who appeared to be the only man of means amongst them, and he and Waterhouse entered into the agreement set out in Complainant's Exhibit 21 (Record, p. 334). In accordance with this agreement a new company was formed by King and Waterhouse, called the Merchants' and Miners' Steamship Co.; capitalized at $100,000 (Comp. Exhibit 25, Rec., p. 351), and the "Garonne" conveyed to said new company for a stated consideration of $167,000.00 (Comp. Exhibit 22, Rec., p. 338); and then by said company mortgaged to King and Waterhouse & Co. to secure the payment of $30,000 to King and $37,000 to Waterhouse & Co. All this *without notice to appellee.* The Merchants' and Miners'

S. S. Co. was incorporated at Waverly, Tioga County, New York, although the negotiations were had and all the parties resided or were then in New York City.

In the bille of sale of Garonne from Waterhouse & Co. to Merchants' and Miners' S. S. Co. (Comp. Exhibit 22, p. 338), the consideration is given at $167,000.00, being the exact amount of the capital stock of the new company, and of the debts against the ship, including the balance of the purchase price due from the North Alaska Company to Waterhouse & Co.

It was testified to that subsequently the Merchants' & Miners' S. S. Co. transferred the steamship Garonne to the White Star S. S. Co., all of which we deem irrelevant to the case, but even if the court will look into that transaction it will be found that there was actually paid to the appellant as stockholder of the Merchants' & Miners' S. S. Co. the sum of $48,500, or over $11,000 more than sufficient to pay the difference due them on the purchase price of the steamship Garonne, so that on the appellant's own testimony it had in hand upwards of $11,000 which should at once be transferred to General Dodge.

During all the time of these negotiations in New York, viz., from July 1st to 10th or 12th, 1904, Gen. Dodge had and maintained an office for business at No. 1 Broadway, open on business days during business hours, and was at his office a part of the time each week, and in telephonic communication with it always. He was a man of

prominence, widely known, and his name and address were in the New York city directory. He was also known personally to W. F. King and to the attorneys for the North Alaska S. S. Co., all of whom were present at these meetings. (See Dodge's testimony, Record, pp. 465, 472, 473). Waterhouse also knew his address in New York, and who he was. (See Record, p. 493, Defendant's Exhibit F 1, Record, p. 394). The place of these meetings was less than a mile from Dodge's offices, and there was telephonic communication between them. (See Rowe's testimony, Record, pp. 69-71; also testimony of Waterhouse for complainant, Record, pp. 156-158). Pusey was also personally known to A. J. Baldwin, attorney for W. F. King, who was present at these meetings. (See Pusey's testimony, Record, p. 499).

But notwithstanding Gen. Dodge's prominence both in the social and business life of New York, and his general reputation throughout the country which was known to Waterhouse, and the fact that Waterhouse admitted to Pusey that he knew Dodge and knew his office address, (see Pusey's deposition, Record, pp. 485, 493, 494), Waterhouse failed to make even an attempt to notify Gen. Dodge of these meetings in New York, and of what it was contemplated doing with the steamer.

At the time the "Garonne" was transferred to the Merchants' and Miners' S. S. Co. she was worth from $90,000 to $100,000. (See testimony of Walker, Rec., p.

122; of Fowler, Rec., p. 128, and of Jackling, Rec., p. 131; also Defendant's Exhibit B, Rec., p. 362.) From June 1, 1904, to April 8, 1905, she was insured for $100,000. (See Complainant's Exhibit 20, Rec., p. 333.) She was purchased by appellant in 1899 in London for 18,000 pounds sterling; had new boilers put in by appellant, at a cost of $44,000, and was in excellent condition when offered for sale to the North Alaska S. S. Co. (See Defendant's Exhibit B, Record, p. 362). In addition to this she had had permanent betterments placed upon her, after she came into the possession of the North Alaska S. S. Co., of at least $20,000, and probably much more. (See Rowe's testimony, Record, p. 72; Jordison's testimony, Record, p. 196; Complainant's Exhibits 9 and 19, Record, pp. 316, 326).

The appellant knew, at the time of the alleged sale of the steamer to the newly created Merchants' & Miners' S. S. Co. that the appellee was abundantly able, financially, to discharge all legitimate claims against her, or due appellant, in order to protect himself. (See Pusey's testimony, Record, pp. 492, 493; also Defendant's Exhibit F 1, Record, p. 394).

POINT ONE.

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN REFUSING TO DISMISS THE BILL OF COMPLAINT FOR NON-JOINDER OF THE NORTH ALASKA STEAMSHIP COMPANY AS A PARTY DEFENDANT.

The rules as to making persons parties to suits in equity, the method of objecting to the non-joinder of parties and the effect of such non-joinder, as laid down by the decisions of the United States Courts and the Equity Rules of the Supreme Court of the United States may with propriety be first reviewed.

Parties to a suit in equity may be summarized as follows: *Proper parties,* i. e., those who have no interest to be bound, but who may be made parties without misjoinder. *Necessary parties,* i. e., those who may have some possible interest and who, if they are not made parties, may be brought before the court by intervention on their own behalf or on application of one of the other parties to the suit. *Indispensable parties,* i. e., those whose presence is an absolute necessity for a proper final decree.

As to the first two classes of parties, it is a matter of discretion to a great extent whether the court will allow them to intervene or compel the complainant to

make them parties on application of a defendant. One of the rules in regard to non-joinder of a necessary but not indispensable party is that if on the face of the complaint the party appears to be necessary and is not brought in, the objection may be taken by demurrer to the bill of complaint, and if it does not appear on the face of the complaint, then the objection must be taken by plea or answer.

U. S. Equity Rules, 52, 53.

Where the objection is neither taken by demurrer, plea nor answer, it is too late on the hearing to raise the objection.

See *Greenleaf vs. Queen,* 1 Peters, at page 148, where Mr. Justice Washington said:

"As a bill may be dismissed where the plaintiff *when called upon* to make proper parties refuses, or is guilty of unreasonable delay in doing so, need not be questioned. But to do so without a demurrer, plea or answer pointing out the person or persons who the defendant insists ought to be made parties, is unprecedented and would most unquestionably be erroneous. * * * "

Segee vs. Thomas, 3 Blatch., page 11, head note:

"An objection of want of parties must be taken by plea or answer and the name or description of the parties who should be brought before the court must be specified. Such an objection cannot be taken at the hearing for the first time."

Wallace vs. Holmes, 9 Blatch., page 65, head note:

"Where in a suit in equity the want of parties is not set up or suggested in the answer, it cannot avail on final hearing, unless the case is one in which the court cannot proceed to a decree between the parties before it, without

prejudice to the rights of those who are proper to be made parties but who are not brought into court."

Judge Woodruff at page 68 said:

"The want of parties not having been set up or suggested in the defendant's answer herein cannot avail unless the case is one in which the court cannot proceed to a decree between the parties before the court without prejudice to the rights of those who are proper to be made parties, but who are not brought into court."

Story vs. Livingston, 13 Peters, 357, where Mr. Justice Wayne, at page 375, said:

"Besides if there was any force in the objection it comes too late, for where a complainant omits to bring before the court persons who are necessary parties, but the objection does not appear upon the face of the bill, the proper mode to take advantage of it is by plea or answer. If the objection appears on the face of the bill, the defendant may demur."

U. S. Equity Rule 47 provides as follows:

"In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

Union Mill & Milling Co. vs. Dangberg et al., 81 Fed. Rep. 73, lays down the rule "if a case in equity can be completely decided *as between the litigant parties,* the fact that there are other persons residing in another state who might have been made parties if they could have

been reached by process should not prevent a decree as to all parties who are within the jurisdiction of the court."

In *Sioux City Terminal R. & W. Co. vs. Trust Co. of North America,* 82 Fed. Rep. 124, it was decided that:

"Under the forty-seventh equity rule, the complainant in a Federal Court need not join any but indispensable parties, when their joinder will oust the jurisdiction; * * *"

The third class of parties are termed *indispensable parties* as was said in *Barney vs. Baltimore City,* 73 U. S. 280-284, by Mr. Justice Miller, after speaking of the first two classes and cases above referred to, goes on to say:

"And there is a third class, whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necescity, without which the court cannot proceed, and in *Shields vs. Barrow,* (17 How. 130) they are there said to be persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

See also 16 Cyc. Equity, 189 et sec.

But all parties are dispensable where a decree can be made showing jurisdiction as to the parties before the court without affecting the omitted party's right. A failure to bring him in before the court must be pleaded.

1. No objection was raised by the appellant by demurrer, plea or answer to the non-joiner of the North Alaska Steamship Company as a party defendant, and therefore, unless that company is an indispensable party, the objection raised for the first time on the final hearing came too late.

U. S. Equity Rules, 52, 53.

Segee vs. Thomas, 3 Blatch, 11,

Wallace vs. Holmes, 9 i. d., 65,

Story vs. Livingston, 13 Peters, 357.

2. As joining the North Alaska Steamship Company as a party would oust the court of its jurisdiction, it was proper to omit that company from this suit.

U. S. Equity Rule, 47,

Sioux City Terminal R. & W. Co. vs. Trust Co. of America, 82 Fed. Rep., 124.

3. As the North Alaska Steamship Company was not within the jurisdiction of the court and could not have been served with process, it was proper to omit that company as a party.

U. S. Equity Rule, 47,

Union Mill & Mining Co. vs. Dangberg, 81 Fed. Rep. 73.

It appears upon the face of the complaint that the North Alaska Steamship Company is a resident of the State of New York, of which state the complainant is also a resident, and therefore the joining of that company as a

party defendant in this action would oust the jurisdiction of the court, and moreover being without the jurisdiction of the court, it could not have been reached by the process of the court. Therefore had the objection been taken by demurrer, plea or answer, that objection would not have availed, and the failure to so object is a waiver of the objection, unless that company is an *indispensable* party.

4. The North Alaska Steamship Company is not an *indispensable party.*

(*a*) The appellant makes his first assignment of error as follows:

"The suit is brought to charge this appellant as trustee, with an indebtedness alleged to be owing by the North Alaska Steamship Company to the complainant and appellee, Grenville M. Dodge. In such proceedings the debtor, the North Alaska Steamship Company, was an indispensable party, and the court below erred in entertaining jurisdiction of such cause in the absence of the North Alaska Steamship Company from the record."

The first sentence is a misstatement, in that the suit was *not* brought to charge the appellant, as trustee, with an indebtedness alleged to be owing by the North Alaska Steamship Company to the complainant and appellee, Grenville M. Dodge; but is an action charging the appellant, as trustee, under a trust agreement, dated June 21st, 1904, with breach of trust, by its failure to apply the security which the trustee is charged with, to the payment of a note for $10,000 given by the North Alaska Steamship

Company to the appellant, as trustee for the complainant; and the decree in this action sustains the contention that the appellant has been guilty of a breach of trust, and by reason of parting with the security to the note, which it held for the benefit of the complainant, is charged with the payment of the full amount of the note.

The issues in the case relate solely to the transactions between the appellant and the appellee. The answer admits the making of the trust agreement and the receipt of the note by the appellant as trustee for the complainant, but denies the trust and the duty on the part of the trustee towards its *cestui que trust,* the complainant, and further denies any breach of trust. Therefore the suit, as to all matters relating to the trust, is properly cognizable by a court of equity, and relates solely to the duties and liabilities of the appellant to the complainant, as to which the North Alaska Steamship Company has no interest whatsoever.

(*b*) In the second part of the first assignment of error, the appellant claims as follows:

"In such proceedings the debtor, the North Alaska Steamship Company, was an indispensable party, and the court below erred in entertaining jurisdiction of such cause in the absence of the North Alaska Steamship Company from the record."

The object of this assignment of error is not, as we will hereafter show, made in good faith nor for the protec-

tion of the appellant or of any right of the North Alaska Steamship Company, but solely to defeat the jurisdiction of this court. This is conclusively shown by the letter of Waterhouse & Company, the appellant, to the complainant, dated August 2, 1904 (defendant's Exhibit N—3), in which the appellant says, "*the North Alaska Steamship Company became defunct and has retired from business.*" And further by the exchange of general releases between Waterhouse & Company and the North Alaska Steamship Company any possible theoretical interest which the North Alaska Steamship Company could have otherwise had in this suit was absolutely eliminated.

It also further appears from the evidence that the Circuit Court's finding that the North Alaska Steamship Company appears to have been organized without any capital other than the hopes of its promoters, is true, and that it never had any assets except the contract of purchase of the steamship Garonne, upon which it had paid borrowed money to the extent of $38,000, and was hopelessly insolvent. (Rowe's testimony, 78, 81, 100; also defendant's exhibit N—3, above referred to.)

Let us examine the entire record to see under the principles as laid down by the United States Supreme Court as to who is an indispensable party, what interest, if any, the North Alaska Steamship Company has in the controversy between the appellant and the appellee.

The essential elements of the suit are based upon a transaction which occurred on the second of June, 1904, at which time the trust agreement between the appellant and complainant was signed and the note of the North Alaska Steamship Company given to the appellant as trustee. The circumstances and transactions which lead up to these papers are more in the nature of the history of the proceeding than relating to its essence, and the real controversy starts with June 2nd.

At this point we find the trustee holding a negotiable instrument made to its own order with an equitable mortgage upon the steamship Garonne, and such note is *prima facie* evidence as to its value, and moreover the trustee is estopped from questioning the amount due on this note by reason of the recital in the trust agreement and in the transactions which then occurred by which the appellee, relying upon the note and the trust agreement, permitted the steamship Garonne to sail from Seattle, and took no action in Seattle to collect the amount then due to complainant from the North Alaska Steamship Company.

The consideration of the trust agreement was the forebearance on the part of the complainant from pursuing his legal right of action against the steamship Garonne and the North Alaska Steamship Company. Based upon this consideration it will appear from the trust agreement that the appellant was incontrovertibly bound by the recital of the amount due to the complainant and by its covenant

to take a mortgage to secure that amount. To allow any evidence on the part of the North Alaska Steamship Company or of the appellant to vary that amount, would be against the fundamental principal of law, that parol evidence is not admissable to vary the terms of a written contract.

See *Goodwin v. Fox,* 129 U. S., page 601, at page 632.

Now, if nothing further had been done between the appellant and the North Alaska Steamship Company to make that company an unnecessary party, nevertheless the appellant would still have been the only necessary party to a suit, and any question in regard to the value of the note or the amount due thereon would have had to have been affirmatively pleaded by the appellant. If the appellant had any equitable defense against being charged with the note or wished to plead payment, that was a matter for them to have pleaded in their answer and to have proved. When the note became due on August 2nd, the appellant could have brought suit on the note and have determined whether there was any possible defense to it. In other words the trustee should have protected himself. In an action brought against a trustee, to account for the securities in his hands, he cannot, in a court of equity, oust the court of jurisdiction on the ground that the makers of the securities should be joined as parties defendant, in order to determine the amount due thereon. For instance, can a trustee, holding bonds of the United States,

when called upon to account for the bonds, say that the United States should be made a party in order to prove how much they owe on the bond? In such a suit, should a railroad company or any other corporation issuing bonds or promissory notes, be made a party to prove the amount due? Clearly not.

This case is not like the case of *Saloy vs. Bloch,* 136 U. S. 338, for in that case *there was an action at law* against a party who had agreed to subordinate a prior lien to an inferior lien, and the court there held that there was no legal cause of action, and by way of *obiter dicta* said that the inferior lien being for an unliquidated amount, it might be necessary in a suit in equity to make the debtor a party, in order to determine what the amount was concerning which the superior lienor had subordinated his claim. But this is a case of a liquidated claim re-presented by a promissory note in the hands of the trustee, and there is no principle of law or equity that we have been able to discover which would require bringing the maker of the note into court in order to prove the amount due. This suit is against the appellant as trustee to declare the amount of the note a lien upon the steamship Garonne in his hands, and he having parted with the security to charge him personally with the damage to the complainant.

A case more nearly in point is *Wells vs. Knox,* 55 Hun. (N. Y.) 245, where it was held that a general cred-

itor under an assignment for the benefit of creditors was entitled to sue the assignee for an accounting without making the assignor a party, where the assignor had died and there were no personal representatives. There Judge Van Brunt said:

"It is to be borne in mind that there are many instances in which persons may be proper parties to an action who are not necessary parties, and that much which has been said upon the subject of making the assignor a party in actions of this character must be viewed in reference to the fact that a person may be a proper party although not a necessary party. The object of the proceeding upon the part of the plaintiff was not to recover the debt from his debtor, but to prosecute the lien which he had because of his debt upon the funds in the hands of the assignee, which lien was given by an assignment under which the assignee held the property upon which it was sought to impress this lien. If this was a proceeding to recover the debt as such against the debtor, undoubtedly the debtor or his legal representative would be a necessary party to the action, but as already suggested that is not the nature of the relief sought, such relief being merely to reach certain property and nothing else."

In the case at bar the complainant is not seeking to recover his debt as such from the appellant, but to make the appellant account for the security which he had and with which he is chargeable, and out of that security to pay the amount of the note given to the trustee.

See also *Putnam et al. vs. Timothy Dry Goods & Carpet Co. et al.*, 79 Fed. Rep. 454.

See also the *Matter of Carpenter,* 45 Hun. (N. Y.) page 552.

At page 558 the court says:

"It is urged that the inaction of the creditors Bliss and Allen, to take steps themselves to recover this property is a defense to Cornell. We think not. Cornell was their trustee; bound to faithful discharge of duty for their benefit. He had taken the property of their debtor and thus had to some extent deprived them of the opportunity of collecting their debt therefrom. It has never been held that a trustee was not liable for breach of trust, because his *cestui que trust* might have brought an action to redress the wrong done to the trust estate."

The terms of the trust agreement of June 2, 1904, which were based upon an adequate consideration, fixes as between the complainant and Frank Waterhouse & Co., the balance due from the North Alaska Steamship Company to Waterhouse & Co. conclusively at $37,671.36, and equally conclusively fixes the amount due to the complainant at $10,000, and Waterhouse & Co. covenants that it shall take a mortgage from the North Alaska Steamship Company upon the steamship Garonne to secure both claims above mentioned, and shall take a note from said North Alaska Steamship Company payable to them as trustee, for the amount so owing to said Dodge, and at the same time the North Alaska Steamship Company then and there delivered to the appellant as trustee for the complainant a note for $10,000, and the president of the North Alaska Steamship Company signed the mortgage referred to in the trust agreement. There was further delivered to the appellant, as trustee, an assignment of $5,000 of freight

moneys to be earned on the voyage to Alaska. Judge Hanford, in his opinion in the court below, said: "I hold * * * that the mortgage which was signed by the president of the steamship company, the promissory note for $10,000 given to the defendant as trustee for the complainant, the assignment of the freight money and the contract signed by the defendant and Pusey, as agent for the complainant, constitute one contract, binding upon all three of the parties." That being so, the presence of the North Alaska Steamship Company as a party to the suit, could not in any way avail the defendant as to its liability to the complainant in this action.

The appellant is further concluded from questioning the amount due on the note, for the reason that the note was made to the appellant as trustee, and whatever indebtedness there was prior to June 2, 1904, from the North Alaska Steamship Company to the complainant, such indebtedness was transferred to the appellant as trustee, and it does not lie in the mouth of the trustee holding the note to say that the complainant must call for an accounting from the North Alaska Steamship Company, the maker of the note. The cause of action on the note was between the trustee and the maker, and what he is now seeking to do is to defeat the complainant's right of recovery by reason of the appellant's own laches in failing to collect the note, or of satisfying itself as to the amount due—if there is any question on that subject. This a court of

equity will not permit. Moreover, parol evidence to vary the terms of a written instrument is not admissable.

Sturmdorf vs. Saunders, 117 App. Div. (N. Y.) 762.

c. The releases exchanged were general releases, and constituted a complete estoppel.

The appellant contends that it would be entitled to recover of the North Alaska Steamship Company the amount of any judgment rendered against it in this action, and therefore this latter company should be a party and concluded by the decree, as otherwise on a suit against it by appellant, it might be able to show that it did not owe the appellee anything. But the Circuit Court held that the North Alaska Steamship Company was not a necessary or proper party; that it had no interest to be affected by the litigation, as the releases exchanged between it and the appellant created an estoppel which would prevent either party recovering from the other for any claims arising prior to the date thereof. This being so, the release from Waterhouse to the steamship company could be effectually pleaded by the latter in bar of any action brought by Waterhouse against it, and consequently rendered it (i. e., the steamship company), a wholly unnecessary party to the suit.

The release from Waterhouse to the North Alaska

Steamship Company is as follows: (See Deft's. Exhibit Q. 3, Record, 456.)

"To all to whom these presents shall come or may concern, Greeting: Know ye that Frank Waterhouse and Company, a corporation having its principal office at Seattle, State of Washington, for and in consideration of the sum of one dollar ($1.00) lawful money of the United States of America, to it in hand paid by The North Alaska Steamship Company, a corporation having its principal office at the City of New York, State of New York, the receipt whereof is hereby acknowledged, have remised, released and forever discharged and by these presents do for itself, its successors and assigns remise, release and forever discharge the said North Alaska Steamship Company, its successors and assigns, of all and from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims or demands whatsoever *in law or in equity,* which against The North Alaska Steamship Company, its successors and assigns ever had, now has or which its successors and assigns hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of the date of these presents.

In witness whereof the said Frank Waterhouse & Company has by the hands of its President and Secretary executed this instrument and affixed a seal on the ninth day of July, 1904.

State of New York }
} ss.
County of New York }

On this 9th day of July, 1904, before me personally came William Bogle, to me known, who, being duly sworn, did depose and say that he resided in Seattle, State of Washington; that he is the secretary of Frank Waterhouse & Company, the corporation described in and which executed the above instrument; that he signed his name there-

to with the intent to bind the said corporation to the terms hereof.

THOMAS H. McKEE,
Notary Public, New York County."

An exactly similar release was executed by the North Alaska Steamship Co. to Waterhouse & Co. On this point Bogle testifies (see Bogle's testimony, p. 280).

"I have here a copy of the release executed by Frank Waterhouse & Company to the North Alaska Steamship Company. The release executed by the North Alaska Steamship Company to Frank Waterhouse & Company was in the same form as the copy now presented, except that it was executed by the North Alaska Steamship Company to Frank Waterhouse & Company instead of by Frank Waterhouse & Company to them. I herewith hand the master a copy of the release referred to, and ask that it be marked as an exhibit to my deposition."

(Document produced and presented by the witness is marked defendants' exhibit "Q—3," p. 456.)

These releases are as full and comprehensive as it is possible for words to make them. On the exchange of these releases the "Garonne," which was Dodge's security, was turned over absolutely, to Waterhouse & Co., without any reservation. No equity remained in the North Alaska Steamship Co. Whatever Waterhouse & Co. did with the steamer—whatever price it sold her for and whether there was a surplus over, after all claims were paid—would give the North Alaska Steamship Co. no right of action.

On the other hand, the release from Waterhouse & Co.

to the North Alaska Steamship Co. was an effectual safeguard to the latter against any claim made by Waterhouse & Co. and as effectual a bar to Waterhouse & Co. if it made any such claims. Under these circumstances, it is difficult to see what possible interest the North Alaska Steamship Co. could have in this litigation, which arises over the failure of Waterhouse & Co. to use their security for the protection of Dodge, in accordance with the trust agreement.

Counsel for appellant contends, however, that this is a proceeding to collect a debt out of or from the assets of the North Alaska Steamship Co., and that, therefore, the latter is a necessary party. But from the moment the steamer passed to Waterhouse & Co. upon the exchange of the releases, she ceased to be an asset of the North Alaska Steamship Co. and became the property of Waterhouse & Co., free from all claim as far as the North Alaska Steamship Co. is concerned; and what we are trying to do is to make Waterhouse & Co. account for trust property which has come into its absolute and undisputed possession, and which it secretly disposed of.

As regards releases, it is laid down that where there is a particular recital and general words follow, that the general words will be qualified by the particular recital; but where *general words only are used,* the release is construed most strongly against the party executing it, and is held to include all demands embraced by its terms,

whether particularly contemplated or not; and as a corollary from the above it follows, and is so held, that a release cannot be varied by parol evidence to show that a certain claim was not in the minds of the parties.

24*Am. & Eng. Ency. Law,* 2nd Ed., p. 294.

Kirchner vs. New Home S. M. Co. (N. Y.), 31 N. E. Rep. 1104.

Pierson vs. Hooker, 3 Johns. (N. Y.) 70.

The Cayuga (C. C. A., 6th Circuit), 59 Fed. Rep. 483.

One of the earliest cases is *Pierson vs. Hooker* (3 Johns 70), where Chief Justice Kent said:

"But the instrument is general and comprehensive, and expressly reaches to every debt and demand of every kind. To show by parol proof that it was not so intended is to contradict or explain away the instrument, which is contrary to the established rule of law."

And, following this decision, the Court of Appeals of New York has held in *Kirchner vs. New Home S. M. Co.* (31 N. E. 1104):

"Construing the language of a release, as we must, most strongly against the grantor, if words are used fairly importing a general discharge, their effect cannot be limited by the bare proof that the releasor had no knowledge of the existence of the demand in controversy. The operation of such an instrument cannot be made to depend upon oral testimony as to the knowledge of the creditor when he executed it, of the liability which he subsequently seeks to enforce."

In the case of *The Cayuga* (59 Fed. 483), the Circuit Court of appeals (6th Circuit) states of a general release:

"It was a release, under seal, of all claims resulting from the collision except the one saved, namely, that for the value of the use of the vessel during the time she was disabled. This agreement for release was in the nature of a contract, and could no more be disputed or controlled by parol evidence than any other instrument of writing witnessing an agreement of parties. A release is held to include all demands embraced by its terms, whether particularly contemplated or not; and direct parol evidence that a certain claim was not in the minds of the parties is not admissible."

The North Alaska Steamship Co. turned over the ship only on being released from *all* claims. Many of these claims were unknown to the steamship company. Waterhouse & Co. showed no itemized statement of the claims, but only a telegram from its bookkeeper in Seattle giving the gross amount of the claims (see Waterhouse's testimoney for complainant, p. 189, and Complainant's Exhibit 11, p. 321), and to make up this amount Waterhouse & Co. included some claims not then even in existence(see Waterhouse's testimony for complainant, pp. 181, 186, 187, and Complainant's Exhibits 15 and 17, p. 325, 326). But the claim of the appellee was known to both Waterhouse & Co. and to the North Alaska Steamship Co. at the "time of the exchange of the releases and long before." The entire evidence conclusively shows this, and as conclusively shows that appellee's claim was not forgotten or overlooked in this settlement, but, as far as Waterhouse & Co. was concerned, at least, was purposely ignored. Waterhouse well knew

the steamer and her value. However, had the North Alaska Steamship Co. paid not only what it owed Waterhouse & Co. upon the agreed purchase price of the steamer, but also the thirty odd thousand dollars which the latter was claiming as liens against the steamer (of which appellee's claim formed no part), still Waterhouse & Co. would not have been justified in turning over the steamer to the North Alaska Co. without protecting the appellee's claim, of which he was trustee. Can it then be allowed to take the steamer (and thereby the entire assets of the North Alaska Co.), at much less than her real value, in payment of these claims, giving and receiving acquittances in full for all claims,—and yet say that in this settlement the appellee's claim was neither contemplated nor included by either of the parties, although the claim was well known to both?

The appellant has no right of recovery over against the North Alaska Steamship Company for any amount decreed in this action to be paid by the appellant to the complainant, (1) on account of the general releases, (2) by reason of the insolvency of the North Alaska Steamship Company and its becoming defunct and retiring from business. There remains as the only possible ground for making the North Alaska Steamship Company a party, that it would assist the appellant in reducing the amount of the note. But this is not a ground for bringing in a party, but is a matter of affirmative defense to be pleaded

and proven by the appellant. The presence of the North Alaska Steamship Company in the suit is not that it would be bound by the decree, but that it should give evidence of the amount due. This could have been accomplished by the appellant's examining the then officers of the North Alaska Steamship Company as witnesses. It must be perfectly apparent to the court that the appellant, by its failure to plead or prove anything in reduction of the amount due, must have been satisfied that it could not change that amount, and that therefore it purposely omitted the attempt, hoping thereby to raise a fictitious objection purely technical and without merit, so as to get this case dismissed, not upon the merits of the case, but upon a purely inequitable and fictitious claim made for the first time upon the hearing, that in some way or other the North Alaska Steamship Company should have been made a party.

We think we have conclusively shown that the appellant has not and can not be prejudiced in any way by reason of the non-joinder of the North Alaska Steamship Company as a party defendant, that full equity can be decreed between the parties without bringing in said company; that the necessity of making said company a party is urged not for its protection or for equity but to defeat the jurisdiction of this court, and that the appellant has failed to raise its objections to the alleged defect of parties in proper manner and at proper time.

If the court should decide that there should be some more formal proof as to the amount due, then, we contend, there nevertheless is sufficient *at issue* before this court between the parties to warrant a decree determining the issues presented by the pleadings, and directing the trustee to pay into court a sufficient amount to stand as security in place of the steamship Garonne until the amount due on the note has been proven to the satisfaction of this court.

These issues upon which we contend a decree should in any event be made are the following:

(a) That Frank Waterhouse & Co. was a trustee under the agreement of June 2, 1904, to take a mortgage to secure themselves and complainant upon the steamship Garonne.

(b) That, as trustee, it held for complainant's benefit a note for $10,000.

(c) That it is considered in equity as having delivered the steamship Garonne to the North Alaska Steamship Company, and of having taken back a mortgage, as provided for, under the trust agreement.

(d) That the redelivery of the steamship Garonne to Frank Waterhouse & Co. in July, 1904, was equivalent to the foreclosure of the mortgage and the buying in of the steamship Garonne, which was then held as trust property by the trustee charged with the lien of the $10,000 note.

(e) That the steamship Garonne was at that time of sufficient value to pay all prior liens and the said note of $10,000.

(f) That Frank Waterhouse & Co. was guilty of breach of trust in parting with the security for the note and became thereby personally liable to the complainant for the amount of the note (or, at least, whatever was due from the steamship company to the complainant).

POINT TWO.

NO ERROR WAS COMMITTED BY THE COURT BELOW IN RENDERING A DECREE IN FAVOR OF APPELLEE, FOR THE SUM IT DID, OR IN REFUSING TO RENDER A DECREE DISMISSING THE ACTION.

It is the contention of the appellee, in the court below, and in this court, that the following propositions were clearly established by the evidence, and justified by the law, in the case; and in sustaining these propositions we now contend the trial court committed no error:

We will discuss these propositions *seriatim*:

First. That by the execution of the trust agreement (set out in Complainant's Exhibit 3) Waterhouse & Co. in-

duced General Dodge to abstain from attaching the freight money or tying up the ship—either of which would have entailed serious loss to appellant—and the appellee was fully entitled to rely and did rely upon that agreement, believing it would be faithfully carried out. By that agreement Waterhouse & Co. became the trustee of appellee, and was bound—not only by the terms of the agreement, but in law, and good conscience—to carry out the trust in absolute good faith, and to the full extent of its powers to protect the appellee's interest in the steamer.

The relationship between Gen. Dodge and Waterhouse & Co. may be said to have commenced with the interview between Mr. Pusey and Mr. Waterhouse at Seattle, on or about June 1, 1904. Waterhouse was then informed by Pusey of the claim of Gen. Dodge, and Pusey insisted on a satisfactory settlement of the same, or, if no settlement were made threatened to take legal proceedings. This would have resulted in stopping the contemplated voyage, and that the ship should sail as proposed was greatly to the interest of Waterhouse & Co. and of the North Alaska S. S. Co.

All this appears clearly, not only by Pusey's testimony (Record, p. 479), which is nowhere contradicted, but also by the testimony of Waterhouse and Bogle (Record, p. 216). It is true Waterhouse in his testimony tries to show that the indebtedness Pusey was seeking

to have paid was a private matter between Smith and Dodge (Record, p. 217), but Bogle's testimony shows differently. He says: "It was explained to me that Mr. Pusey represented Gen. G. M. Dodge of New York, and that Gen. Dodge held a claim *against the North Alaska Steamship Company* for some $10,000." (Record, p. 264.) Appellant also states in its answer: "That said Smith and said Pusey agreed that said North Alaska Steamship Co. was indebted to said complainant in the sum of ten thousand dollars." (Record, p. 22.)

Then Complainant's Exhibit 1 (Record, p. 531) is a duly executed instrument of the North Alaska Steamship Co., acknowledging the debt; and the testimony of Rowe (Record, p. 107) and of Pusey (Record, p. 479) shows conclusively that the money borrowed from Dodge was used to make a payment on the steamer "Garonne," and therefore for the benefit of the North Alaska S. S. Co. Finally, in the trust agreement itself (Complainant's Exhibit 3, p. 537) it is expressly stated that the North Alaska Steamship Co. is indebted to G. M. Dodge for $10,000 borrowed money.

All this testimony, coupled with the fact that Waterhouse & Co. afterwards took the memo. agreement, note and mortgage, as trustee for Dodge, we think disposes of any claims that this indebtedness was a private transaction between Smith and Dodge.

There was, beyond question, sufficient interest of the

North Alaska Steamship Co. in the ship on the 2nd of June, 1904, to have enabled Gen. Dodge to have secured his claim for $10,000 by legal proceedings. And moreover by complainant's exhibit 19 it appears that there was due at that time to the North Alaska Steamship Co. cash from W. H. Ferguson, traffic manager, L. H. Gray & Co., Arlington Dock Co. and Alaska Pacific Navigation Co. of upwards of $20,000, which Gen. Dodge could have attached in the state courts at Seattle and thus secured his claim.

It was under these circumstances that the trust agreement (Complainant's Exhibit 3, Record, p. 537) was executed. Pusey placed entire confidence in Waterhouse & Co. The note for $10,000 for Dodge's claim ran to it; the mortgage securing both interests was in its name alone; and it was to receive and remit to Dodge any moneys received from Alaska.

The evidence (Record, p. 486) clearly shows that when Pusey went to Seattle to protect appellee's claim he was prepared to bring suit and enforce it, and only refrained from doing so upon the faith of the trust agreement signed by Waterhouse & Co., and at the earnest solicitation of both Smith and Waterhouse. A suit would probably have been successful; at any rate, it would have resulted in tying up the steamer and delaying the voyage, which would have resulted in serious loss to both Waterhouse & Co. and the North Alaska Steamship Co. But

it is not material whether the suit would have been successful or not. *Forbearance in bringing a suit at law or in equity is a valuable consideration.*

Parsons on Contracts, Book 2, Chap. 1, sec. 5, Vol. 1, page 441.

Hammer v. Sidway, 124 N. Y. 538, 27 N. E. Rep. 256.

Defendant's Exhibit X (Record, p. 386) shows that the condition of the steamer was fully explained to Pusey at the time he was in Seattle, and in the words of the exhibit, he considered her a "very valuable asset." That he was confirmed in this belief by the defendant, Waterhouse, will not admit of question. In fact, throughout the whole testimony, in all his correspondence, Waterhouse is constantly insisting that the ship is in first class condition, and an exceedingly valuable and profitable piece of property—never having been operated at a loss, etc. (See Defendants' Exhibits B, R and X (Record, pp. 363, 378, 386.)

The evidence also shows that this trust agreement was drawn up by appellant's attorney, and carefully considered before being signed. (See Bogle's testimony, Record, pp. 266, 268.)

Relying upon the promises made him, and the paper writings executed by Waterhouse & Co., and believing he had protected the interests of Dodge as fully as possible

under the circumstances, and that the trust assumed by Waterhouse & Co. would be carried out—as Waterhouse & Co. agreed to carry it out—in good faith—Pusey left Seattle.

Second—That the mortgage which was to be executed (see Complainant's Exhibit 4, Record, p. 538) was, under the doctrine that equity will consider that done which ought to have been done, an equitable mortgage; and that so long as the title to the ship was in Waterhouse & Co., it was able to protect the interest of the appellee in the ship as fully as if the title to the ship had passed to the North Alaska S. S. Co., and the mortgage had been duly executed and delivered.

On this question the learned Judge of the Court below said:

"I hold, however, that the mortgage which was signed by the President of the Steamship Company, the promissory note for ten thousand dollars, given to the defendant as trustee for the complainant, the assignment of the freight money, and the contract signed by the defendant and Pusey as agent for the complainant, constitute one contract, binding upon all three of the parties. The documentary evidence in the case proves that notice of the transaction was promptly sent to the secretary of the Steamship Company in New York, and that Smith's authority as president of the Company was not disputed. The evidence also proves that there was more than a mere executory contract to sell the steamship to the North Alaska Steamship Company, because the sale was

consummated by complete manual delivery of the ship to the purchaser, and she was permitted to leave port of Seattle under control of the purchaser in consideration of the contract, and that she earned money for the purchaser; therefore the defendant held the legal title subject to the trust created by said contract, and except as against other creditors and *bona fide* purchasers, the ship was effectually hypothecated for the complainant's debt." (Record, p. 566.)

It is a well established maxim of equity that "Equity considers that done which ought to have been done," and although this mortgage was not, in fact, finally executed by the officers of the North Alaska S. S. Co., other than Smith, was, nevertheless, a mortgage to all intents and purposes—in other words, an equitable mortgage.

"The whole doctrine of equitable mortgages is founded upon that cardinal maxim of equity which regards that as done which has been agreed to be done and ought to have been done. In order to apply this maxim according to its true meaning the court will treat the subject matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, * * * always regarding the substance and not the form of the transaction."

Sprague vs. Cochran (N. Y.), 38 N. E. Rep. 1000, citing Story Equity Jur., secs. 64g, 156.

In the case of *Ketchum vs. St. Louis,* 101 U. S. Co-op. Ed. 999 (11 Otto, 306), Mr. Justice Harlan, speaking of this subject, cites with approval the following by Lord Thurlow in *Legard vs. Hodges,* 1 Ves. Jr. 478: "I take this to be a universal maxim, that wherever persons agree concerning any particular subject, that, in a court of

he was financially able to avail himself of it admits of no doubt (Record, p. 493), and considering the value of the steamer as established by the evidence, it would clearly have been his interest to do so. When he was deprived of this right, which was a valuable right, in the way set forth in the evidence, then a court of equity will grant him relief to the full extent of the wrong he has suffered.

The facts, and they are uncontradicted, that Waterhouse knew of Gen. Dodge's general reputation; knew his financial condition; and knew his office address (Record, pp. 485, 491); and knowing all these made no effort either to have him present or to notify him of the meetings in New York—and these meetings extended over some 10 days—seems to us to afford conclusive proof that, from the time of making the deal with King, Waterhouse had determined to regain possession of and title to the steamer in fraud of Gen. Dodge's claims.

At the time of the sale of the "Garonne" to the Miners & Merchants' Company, she was reasonably worth $100,000. We think the evidence unmistakably shows this. The testimony of Walker (Record, p. 122), who is a marine engineer and naval architect, places the value at $86,000 to $90,000. The testimony of Fowler (Record, p. 128), who was Lloyd's agent at Seattle and who examined and valued the ship for Waterhouse & Co., places the same at $95,000. The testimony of Jackling (Record,

p. 131), who was a marine engineer of twenty-five years' experience and knew the ship, placed the value at $100,000 to $125,000. In addition to this she was constantly kept insured for $100,000 (Comp. Ex. 20). Waterhouse contracted to sell her for $85,000 (Record, p. 141), and there was at least $30,000 of permanent improvements put on her afterwards and probably much more (Record, pp. 317, 328). Then Waterhouse's estimate of the ship is clearly shown by his own testimony in his letter dated January 26, 1904 (see Defendants' Exhibit B, Record p. 362), he states that she was examined thoroughly by the superintendent engineer of the Pacific Coast Steamship Company a few months previous, who reported that her hull alone was worth $100,000; that her engines were in good condition; that $44,000 had been expended on her boilers only two years previous; that her furnaces, boiler tubes and combustion chambers were new and the boilers in first class condition; that he bought the boat in London in 1899 for 18,000 pounds sterling, or a little less than $90,000, and that her condition had been greatly bettered in the meantime on account of the large amount of money expended on her boilers; that her equipment had been carefully taken care of; that he had *never made an unprofitable voyage to Alaska with her.* He also states (see Defendants' Exhibit R, Record p. 378), under date of June, 1904, that, had he not sold her to the North Alaska Steamship Company, he could have sold her to

other parties on the same date for the same amount. Her value must be estimated at what she was fairly worth at Seattle on the day she was sold to the Miners & Merchants' Steamship Company. Any evidence of what it was necessary or advantageously to sell her for in Europe, after she had been through a tumultuous voyage and abandoned by her charterer is immaterial and irrelevant.

Even were there no testimony as to the value of the Garonne, for the purposes of this action, she must be worth $167,000 for the following reasons:

At the time the "Garonne" was conveyed to the Merchants & Miners S. S. Co. in consummation of the scheme between appellant and W. F. King, the evidence shows that, as between the parties to this transfer the ship was considered to be, and must be conclusively held to have been worth $167,000.00. (Comp. Exhibit 22, Rec. p. 338). While this sum may be in excess of the value fixed by other testimony, still it was the value fixed by the parties, which they had a right to do, and which they cannot now be allowed to contradict. In fact they have not tried to contradict it. On this value they made their bargain and reaped their profits.

Notwithstanding the claim of appellant that the stock of the Merchants and Miners' S. S. Co. was not actually issued, it was in law issued, whether the manual work of signing the certificates had occurred or not, and the com-

pany filed a certificate with the Secretary of State of New York (Complainant's Exhibit 26, Record p. 357) which shows that the whole capital stock had been paid for, and by reference to Waterhouse's testimony for complainant (Record, p. 133), it will appear that it was fully paid for by the steamship Garonne, and therefore the value of the steamship Garonne at $100,000 over and above any indebtedness against her is by the laws of New York made absolutely conclusive. See Article 3, Section 42 of the Stock Corporation Law of the State of New York in effect April 16, 1901, which reads as follows:

Sec. 42. CONSIDERATION FOR ISSUE OF STOCKS AND BONDS:

"No corporation shall issue stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation. Any corporation may purchase any property authorized by its certificate of corporation, or necessary for the use and lawful purposes of such corporation, and may issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this act; and in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive; and all statements and reports of the corporation, by law required to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported as issued for property purchased."

The United States Courts will take judicial notice of the public statutes of each state.

Lamar vs. Micou, 114 U. S. 218.

Mills vs. Green, 159 U. S. 651.

As the stock represented the ship and was the only asset of the company, the effect of this was to convey the ship jointly to Waterhouse & Company and King in equal proportions (see Waterhouse's testimony for defendants, Record p. 133). The transfer of the ship fully paid for the stock and the officers of the company certified that the stock was fully paid up. (See Complainant's Exhibit 26, Record p. 357), so that at this point it appears that the benefits which the appellant obtained while in New York in July, 1904, was stock of a corporation which as to them at least was conclusively worth $50,000 over and above the balance due on the purchase price of the ship.

There is no doubt that the profit to Waterhouse & Co. by the agreement with King and his associates, and the sale to the Merchants & Miners' Co., and subsequent sale to the White Star Co., was large—more than enough to have paid off what was owing to the complainant. Waterhouse & Co. received $48,500 in stock of the White Star S. S. Co., while at the time of the sale to King he only claimed an unpaid balance of $37,671.46 on the purchase price, and this stock was practically fully paid, and will,

therefore, be presumed to be, and undoubtedly was, worth par. (See testimony of Bogle, Record p. 249, 308).

Appellant put in a mass of documentary testimony tending to show that the North Alaska Steamship Co. failed to carry out its obligations to Waterhouse & Co. and failed to execute the mortgage to secure Gen. Dodge and Waterhouse & Co. But there is no testimony that notice of this failure was ever given to Gen. Dodge, and he given an opportunity to protect himself. Waterhouse never attempted to communicate with Gen. Dodge, and it was not until after both a telegram and a letter from Pusey, to Waterhouse & Co. at Seattle, asking him what the situation of affairs was, was there any communication whatever between the trustee and Cestui Que Trust. Then came a most astonishing letter from a trustee, disregarding all his duties, making misstatements, and throwing the trust agreement and papers back to Gen. Dodge, saying that he was unable to do anything for him.

Taking the testimony as a whole, and considering it in the light of all the surrounding circumstances, it is impossible to reach any other conclusion than that the rights of Gen. Dodge were deliberately sacrificed at the series of meetings in New York, culminating in the sale of the ship to the newly formed Merchants & Miners Steamship Co. It cannot be said—although it would be no legal excuse were it so—that Gen. Dodge's rights were unintentionally overlooked. They were at all times well known to Frank

Waterhouse, and he was intimately connected with, and personally interested in all the ramifications through which the title to the ship passed until her final disposition.

Frank Waterhouse was president and chief stockholder in Frank Waterhouse & Co.; he was president, and equal stockholder with King in the Merchants & Miners Co.; and he was a stockholder and president of the White Star Co., to which the ship was afterwards sold. Waterhouse was the dominant factor and guiding spirit in all that was done in New York.

And if the appellant's only purpose was to protect itself for what still remained due it for the purchase of the ship and the debts against her, the sacrifice was a needless one; for the value of the ship was amply sufficient to cover all these claims and Gen. Dodge's claim as well. Of this there can be no doubt. The testimony of the appellee as to the value of the ship was not contradicted—there was not even an attempt at contradiction—notwithstanding the ship was known in Seattle for years.

But it is idle to say that appellant's object at these New York meetings was only to protect itself. The testimony shows that it bent every effort to get back the ship —well worth $100,000—at as little risk and as great a profit to itself as possible. To have acknowledged Gen. Dodge's claim at that time would have decreased that profit by some $10,000; and therefore the claim was ignored and the profits increased correspondingly.

This was done with full knowledge of appellee's rights, which appellant was bound not only by written agreement but by every principle of honesty, good faith and business decency to protect; done with full knowledge of Gen. Dodge's ability to protect his own and all other interests in the vessel, had he had the opportunity; and done within a stone's throw of his office, where a telephone call would have reached him at any time. Then, when he learned how he had been defrauded, and called his trustee to account, Waterhouse, expressing a feeling of "surprise and annoyance" that he should be even asked for an explanation, returns the papers to complainant with the statement—palpably false—that he had "no opportunity of protecting your claim."

Gen. Dodge has acted with the utmost good faith throughout this entire transaction, and he is here now, asking a Court of Equity what he believes he is entitled to under the law and under every rule of equity and good conscience—under every rule of fair and upright dealing amongst honorable business men—viz: the return of the money out of which he has been defrauded by the appellant.

We most respectfully submit that the decree of the Honorable Circuit Court was eminently right, and should be affirmed.

Respectfully submitted,

GEO. H. KING,

Solicitor for Appellee.

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THEODORE M. TAFT, New York,

P. TECUMSEH SHERMAN, New York,

Of Counsel.

equity, as against the party himself, and any claiming under him, voluntarily or without notice, raised a trust."

"There is generally no difficulty in equity in establishing a lien, * * * wherever that is a matter of agreement, at least against the party himself, and third persons who are volunteers or have notice, for it is a general principle in equity that as against the party himself and any claiming under him voluntarily or with notice, such an agreement raises a trust."

Story, Eq. Jur., vol. II, sec. 1231.

Pinch vs. Anthony, 8 Allen (Mass.) 536.

A court of equity will treat an agreement for a mortgage or pledge of personal property as binding, and will give it effect according to the intention of the contracting parties.

White Water Co. vs. Vallette, 21 Howard 414 (62 U. S. Co-op. Ed., 154).

See also:

3 *Pom. Eq. Jur.,* secs. 1235, 1237.

Gest vs. Packwood, 39 Fed. Rep. 533.

Bridgeport, &c. Co. vs. Meader, 72 Fed. Rep. 118.

Love vs. Sierra, &c. Mining Co., 32 Cal. 639.

The paper title of the steamship "Garonne" was in Waterhouse & Co. on the 2nd day of June, and remained in them until after the transfer to the Merchants & Miners Steamship Co., therefore the agreement to take a mortgage as effectually mortgaged the boat, while in the hands of Waterhouse & Co., as though the mortgage had been executed, and the fact that the mortgage was not executed has not the slightest bearing upon the lia-

bility of Waterhouse & Co. as the holders of a mortgage. The reason for taking the mortgage was based upon the idea that Waterhouse & Co. would put the title of the steamship in the North Alaska S. S. Co., and that, in order to protect Waterhouse & Co. and Gen. Dodge, it would then be necessary for the North Alaska S. S. Co. to execute a mortgage back to Waterhouse & Co.; but so long as the paper title did not pass out of Waterhouse & Co. there was no necessity for the North Alaska S. S. Co. to execute the mortgage, in order that Waterhouse & Co. should hold the boat, or hold a lien on the boat, as trustee for itself and Gen. Dodge. In other words, the declaration of trust by Waterhouse & Co., so long as the title to the "Garonne" remained in Waterhouse & Co., was as effectual for the protection of Gen. Dodge as though the vessel had been transferred to the North Alaska S. S. Co., subject to a mortgage back to Waterhouse & Co.

The ship was allowed to sail only on the strength of the mortgage and trust agreement entered into for the protection of Gen. Dodge. That she should sail was manifestly to the interest of and was desired by the appellant and the North Alaska S. S. Co.; and Pusey would not have permitted her sailing had he not felt sure the agreements entered into be carried out, and that the trust assumed by Waterhouse & Co. would have been faithfully executed as it agreed to execute it in good faith.

Third—That the appellant, knowing the interest of the appellee in the ship and knowing his address, and knowing that the actual value of the ship was greatly in excess of the claims against her and the amount due Waterhouse & Co. on the purchase price, and that the appellee was financially able to protect his interest in the ship, if he received notice, fraudulently planned and conspired with W. F. King and his associates to obtain the title to the ship to the exclusion of the right of the appellee, and in bad faith and in violation of the trust existing between Waterhouse & Co. and the appellee.

Fourth—If there was no actual fraudulent combination between King and his associates and the appellant to obtain the absolute ownership of the steamship Garonne freed from the trust to Dodge, yet the action of the appellant was nevertheless a fraud in law and a violation of the trust agreement, in that it was a repudiation of the trust agreement, for the purpose of gaining a personal profit over and above the just amount due to the appellant, and such personal profit was in fact obtained to the extent of $50,000 in stock of the Merchants & Miners Steamship Company, which stock was, as to the appellant, conclusively worth $50,000.

The third and fourth propositions are so closely connected that they may be discussed together.

About the 1st of July, 1904, Mr. Waterhouse, and his attorney, Mr. Bogle, went to New York. At this time there was a balance due on the purchase price of the ship of $37,671.46, and on claims against the vessel or against the North Alaska Steamship Company (a large part of which were for commissions due Waterhouse) amounting, according to Waterhouse's statement, to $30,000. Waterhouse was insisting on a settlement with the North Alaska S. S. Company and a clearing off of the indebtedness incurred. (Comp. Exhibit 9, Record, p 316.)

When Waterhouse reached New York he and W. F. King, who was the financial backer and controlling factor in the North Alaska S. S. Co. (Rowe's testimony, Record p. 111), formulated and put into execution a plan to obtain the steamer for themselves, in utter disregard of the trust agreement in favor of Gen. Dodge, and without paying or in any way providing for the payment of his claims. In this connection it must be borne in mind that Waterhouse was the controlling influence in Waterhouse & Co.—he was the company—and King was in absolute control of the North Alaska S. S. Co.

The indebtedness of $30,000.00 Waterhouse insisted must be provided for. Why were these debts any more sacred than the debt due Gen. Dodge? We think the evidence clearly answers this question. A portion of them were debts which were, or might become liens against the ship herself. Another portion, and no inconsiderable

portion, were the commissions which Waterhouse claimed were due to himself or his company. Of the others, Waterhouse evidently feared an effort to hold him liable for on his return to Seattle. Waterhouse showed no vouchers for any of this indebtedness—simply a telegram from his treasurer in Seattle (Record, p. 189). In fact, it is clearly proven that some of the $30,000.00 Waterhouse received was used to pay bills incurred after the ship was conveyed to the Merchants & Miners Company (see Comp. Exhibits 15 and 17, Record, pp. 181, 186, 324, 326; Record, pp. 181, 186.)

To provide for these claims, King agreed to advance $30,000.00, and Waterhouse and King, and the latter's associates, were to form a new company—the Merchants & Miners S. S. Co. stocked for $100,000 and the stock divided equally between them,—to which the steamer was to be sold for its entire capital stock; the new company giving its note to Waterhouse for $37,671.46, and to King for $30,000.00, both secured by a mortgage on the steamer (Record, p. 160).

Waterhouse & Co. and the North Alaska S. S. Co. then exchanged releases, releasing each other from all claims whatsoever (Deft's. Exhibit, Q. 3), and Waterhouse took possession of the steamer, with all the improvements that had been made upon her. The very day this was done, *without any notice to Gen. Dodge,* and without any attempt to protect his interest or

allow him an opportunity to protect it himself, the defendants, in utter disregard and violation of the trust agreement entered into at Seattle for their benefit and at their request, proceeded to carry out the scheme with King. The Merchants & Miners S. S. Co. was formed and capitalized for $100,000.00, and the "Garonne" transferred to it in full payment of the capital stock. Waterhouse & Co. and King then divided this stock equally between them, and the new company gave its note for $37.671.46 to Waterhouse & Co., and for $30,000.00 to King, and a mortgage on the steamer to secure them (Record, p. 160).

To further guard against any knowledge of this reaching Gen. Dodge, the Merchants & Miners S. S. Co. was incorporated from a small, obscure town, in the central part of New York State, where complainant would never be likely to hear of it. To have incorporated from New York City, and have the same published in the various commercial journals would have been too risky (Comp. Exhibit 21, Record, p. 334).

At the time of the sale of the ship to King, the defendants were not being pressed for payment of any of the bills against her (Record, p. 162), and as a matter of fact a number of the bills were not paid until some time afterwards (see Complainant's Exhibit 9), so that it is apparent that Waterhouse was not so pressed for payment that he did not have time to communicate

with Gen. Dodge or to seek for another and better purchaser for the ship than King and his friends.

That this transaction was extremely profitable to Waterhouse & Co. will admit of no doubt. It had fixed the selling price of the Garonne in February, 1904, at $85,000 (Record, p. 141). There had been expended for betterments upwards of $31,000 (Comp. Ex. 9); it had received $47,328.54, leaving a balance due of $37,671.46 on the purchase price, and it now receives a mortgage on the steamer for the balance of the purchase price, $37,671.46, and a half interest in the steamer as well, represented by $50,000 of stock in the Merchants & Miners Company; and in order to justify this unconscionable situation Waterhouse & Co. simply return the trust agreement and other papers to General Dodge with misstatements and say they are sorry they can do nothing for him. Such a situation is intolerable and will not be permitted by a court of equity.

Why was not Gen. Dodge notified of all this and given a chance to protect himself? If the appellant was selling the ship in good faith, as it claimed to be doing, what possible objection was there to Dodge knowing of it and been given an opportunity to protect his interest? Dodge had an interest in the ship to at least $10,000. His claim was junior to the claim of Waterhouse & Co. and to all *bona fide* maritime liens against the vessel. Under these circumstances he had the undoubted right

by law to pay off all claims against the ship, and take her, in the hope of realizing his claim out of her. Why was he not given this opportunity? The appellant says he could not be found in New York. It appeared from the testimony to the trial court that a ten-year-old boy of ordinary intelligence could have found him. His office was open at all reasonable times; he himself was there pretty constantly; there was telephone connection between his office and the place where these meetings were held; the distance between them would not exceed a mile; Gen. Dodge was a man of great prominence known to a large circle; a letter addressed to him in New York, without the street number, would certainly have reached him; his business address was known to Waterhouse and a number of those at the meeting to-wit, W. F. King, Baldwin, and McKee & Frost, attorneys, were personally acquainted with him (Pusey's testimony, Rec., p. 479). All this testimony was entirely uncontradicted. The only conceivable reason why he was not notified was that he was not wanted at the meetings, and it was not intended that his interests should in any way be protected.

The appellant was entitled to an opportunity to protect his equity in the steamer to the extent of the payment of all claims against her, holding the steamer as security. Had Waterhouse & Co. carried out the trust agreement in good faith as it promised and was bound to do, Gen. Dodge would have had this opportunity. That